Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1606

James E. Carter, Jr.,
Appellant,

vs

City of Kansas City, Missouri,
Appellee.

On Appeal From the Missouri Court of Appeals
Western District, Motion to Transfer to the
Supreme Court of Missouri Having Been Denied

REPLY TO MOTION TO DISMISS OR AFFIRM

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There are several statements in the Motion to Dismiss that should be reviewed for this court.

The motion suggests that appellate jurisdiction to construe the United States Constitution is in the Supreme Court of the State of Missouri (p 14) and presents Article V, Section 3, of the Missouri Constitution of 1945 at page 27. The information is of historical value to show that such jurisdiction was in the Missouri Supreme Court. The Missouri Constitution as amended August 4, 1970, and August 3, 1976, is presented in the Jurisdictional Statement at page 7a. It reveals that jurisdiction to construe the federal constitution is now in the Court of Appeals while the Missouri Supreme Court construes the State constitution. See Jurisdictional Statement, p 5. The Missouri Supreme

Court accepted the issue as a federal question and transferred the case to the Court of Appeals where jurisdiction was vested.* When an issue has been accepted in the state appellate court as a federal question, the federal question is preserved for appeal to this court. Coleman v Alabama, 388 US 129, 133; Whitney v California, 274 US 357, 360 - 361; Manhattan Life Insurance Company v Cohen, 234 US 123, 134. See page 5, infra.

The city has also suggested that the question raised is unsubstantial. Perhaps the court will tolerate a paraphrase of Wesberry v Sanders, 376 US 1, 17: "Other rights are illusory if the right to (make a living) is undermined." It is for this court to determine if the right to pursue a livelihood (liberty) in the instant case is less substantive, essential, basic, or fundamental than the right to vote adjudicated in Wesberry. The court declared in Wesberry that the right to vote was fundamental "because it was preservative of all rights." The right to make a living is surely much more fundamental and substantive than the right to vote if evaluated by such a standard.

This court has found that taxes on rights secured by the Bill of Rights have presented substantive issues for this court to consider and overturn in the past: License taxes on the expressions of religion; Kunz v New York, 340 US 290; Follett v McCormick, 321 US 573; License tax on the right to speech; Staub v City of Baxley, 355 US 313; License tax on the freedom of association; Bates v Little Rock, 361 US 516; License tax on the freedom of the press, Jones v Opelika, 319 US 103; License tax on the right to vote; Harper v Virginia, 383 US 663; U.S. v Texas, 252 F. Sup. 234; affirmed, 384 US 155. The federal right to interstate commerce has been found on a multitude of occasions

* SEE MOTION TO DISMISS, P. 26.

to be an unsuitable basis for taxation. West Point Grocery v Opelika, 354 US 390; Dean Milk Company v Madison, 340 US 349.

This court has repeatedly held that if a tax can be levied on a privilege, the privilege is within the control of the taxing agency. Control, by taxation, is an attribute of sovereignty. The substance of the question posed by appeal is, simply stated; "Does the city have sovereignty, and control, over the right of an individual to pursue a livelihood and the entering and fulfillment of contracts to that affect?" Ref. Motion to Dismiss, p 11, paragraph 1.

Appellee introduces a unique claim in this court that the tax is imposed on "proprietorships" and not on individuals or natural citizens but declines to offer any legal authority to support such a distinction. The word in not found in the pertinent city ordinances. It is elementary that businesses pay no taxes. Only people, or a legal entity such as a state created corporation, pay taxes. Whether we call it a proprietorship, a business, a natural citizen, a person, or an entrepreneur, it is an individual in the pursuit of a livelihood, without any privilege or franchise granted by the state, that is the object of the city occupational license tax. Ref. Flint v Stone Tracy, 220 US 107, 162; Lynch v Household Finance Corp., 405 US 538. This court looks to the effect of the tax and not to the mere form. Bates v Little Rock, 361 US 516, 525; Richfield Oil Corporation v State Board of Equalization, 329 US 69.

City Ordinance 21.20 that was cited in the information reproduced in the Jurisdictional Statement at page 6a reveals that 'person' is used as the object of the tax five times. It is the purpose of the constitution to protect 'persons' and the fundamental rights of the individual from infringement by the government. Truax v

Corrigan, 257 US 312, 338.

The city suggests that the issue presented has "long since been laid to rest by this Court..." The only case cited to uphold this contention is American Manufacturing Company v City of St. Louis, 250 US 459, which has been extensively discussed below. It holds that the tax is a valid exercise of the city "unless federal right be shown." The appellant has continually shown nothing but federal right and this clear and obvious distinction is definately made within the Opinion. American Manufacturing Company, Incorporated, as a creation of the state, had no claim to any federal rights of an individual. Apparently this court has not previously adjudicated the issue of individual rights in the pursuit of their livelihood.

The Motion to Dismiss acknowledges that the tax is imposed as a revenue tax. p 10. The fact that it is enforced by police power was documented in the Jurisdictional Statement. The exercise of police power to enforce revenue measures is the essence of despotism. Lochner v New York, 198 US 45, 56; Adair v United States, 208 US 161, 173-174. Such a practice lead to the Magna Charta; it precipitated the American Revolution. Whereas basic fundamental rights may be the subject of regulation in the public health and safety, they are not suitable basis for revenue taxation.

The Motion to Dismiss suggests that a "summons" was served on the appellant. At page 17, the city reproduced the "information" that was accepted by the appellant.

The city further informs the court on page 4 that the petition for removal filed in the United States District Court is outside of the transcript. It is to be found at page 8 and 9 of the transcript with four pages

of Supreme Court citations construing federal rights. T. 10 - 13.

Erroneous conclusions regarding the service of pleadings in municipal court have been made by the appellee. In the event that they are of interest to this court, or this court wishes to determine why the pleading was not in the file jacket on appeal after service was made on the municipal court, the issues can be expounded in an auxiliary brief as requested in the Jurisdictional Statement, p 4.

For these reasons, this Court should note probable jurisdiction.

Respectfully submitted.

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The following should be added to page 2, supra.

Any deficiency in the particularity with which a federal issue is framed is cured if the highest state court assumes that a specific federal issue is properly before it. The Supreme Court does not then inquire into the framing of the issue by the litigant. Charleston Federal Savings & Loan Ass'n v Alderson, 324 US 182, 185; Saltonstall v Saltonstall, 276 US 260, 267.

ADDENDUM

The following exerpts are offered to show the substantive issue that has been presented. The information appeared on page 9A of the Kansas City Star newspaper dated May 12, 1980. The article reflected on the National Small Business Week.

"...the nation's 13 million small businesses...

"Small business long has been recognized as the generator of inventions, of jobs, of incomes. In the United States, it accounts for 43 percent of the Gross National Product... Moreover, it provides 58 percent of all employment opportunities and represents 90 percent of all businesses.

"... U.S. small business last year recorded $630 billion in sales and paid $95 billion in salaries...

"... small businesses in recent years have received less than 3.5 percent of all federal research development dollars but nonetheless have accounted for four times as many innovations per R&D dollar as medium-sized firms and about 24 times as many as large firms...

"... between 1969 and 1976, small business accounted for more than 98 percent of all new private-sector employment in the United States.

"...small business keeps competition alive, thus assuring technological advancement, variety, quality and cost control..."